IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 537 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RUPABHAI KAKDIYABHAI VARLI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 537 of 1997

MS BANNA S DUTTA for Petitioner No. 1

MR PRACHHAK APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 05/05/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

#. The appellant-accused-Rupabhai has filed this appeal through jail and challenged the impugned judgment and order of conviction and sentence dated 22.5.1997 passed by the learned Sessions Judge, Navsari in Sessions Case No.68 of 1994 convicting the appellant-accused for the offence u/S.302 IPC and sentenced him to suffer life imprisonment and to pay fine of Rs.5,000/= in default further to undergo 2 months SI.

#. It is the prosecution case that in the early morning hours of 4.00 a.m. on 14.2.1994 deceased-Daiju, Sarpanch of village Choravni Kalipadi, Taluka Vansda was sleeping in his kacha house with his wife. At that time the accused entered the house of the deceased and gave one axe blow on the head of the deceased and because of that the deceased succumbed to his injuries. Manki, wife of deceased-Daiju was sleeping by side of deceased in the house at that time on hearing the noise of axe she got up and saw accused-Rupa leaving his house with an axe in his hand. She started crying thereupon, Lalji, Sukkar, Keshu, Sonu and Magan came there. While crying she was telling that accused-Rupa committed murder of her husband by giving axe blow. Deputy Sarpanch Lahanu was informed by Parsu Lalji-nephew of deceased-Daiju at about 7.00 a.m. Thereupon, he went to the place of Sarpanch and found lying dead in his house. He asked Manki wife of Sarpanch Daiju about the assailant, but she did not name any one. She had only stated that someone assailed the Sarpanch. Thereafter, he went to the police station at about 4.15 p.m. and lodged FIR Ex.24. Thereupon, the police started investigation and arrested the accused. After completing the investigation, police filed charge sheet against the accused u/S.302 IPC. The learned Magistrate committed the case to the court of Sessions.

#. Before the learned Sessions Judge, the prosecution examined complainant-Lahanu PW-2 Ex.11, Manki, wife of deceased Daiju PW-3 Ex.13 as the sole eye witness and Lalji Keshu PW-4 Ex.17 and Sukkarbhai Devlu PW-5 Ex.18, who reached the house of the deceased after the incident. The I.O., Shri Rambhai Jhala, investigated the case was examined as PW-7 Ex.23. The prosecution also examined formal panch witnesses etc. and the prosecution witnesses, the leanard Judge came to the conclusion that prosecution proved its case against the accused beyond reasonable doubt, therefore, she had convicted the appellant-accused for the offence u/S.302 IPC for committing murder of deceased-Daiju on 14.2.1994 at 4.00

a.m. in his house. This order of conviction and sentence dated 22.5.1997 passed by the learned Sessions Judge is challenged in this appeal by the appellant-accused through jail.

#. He had asked for legal aid, therefore, Ms.Banna Datta was appointed by the office to defend his case in this appeal.

#. Ms.Datta took us through the entire evidence of the prosecution witnesses as well as reasoning assigned by the learned Judge and submitted that the evidence of sole eye witness Manki was not at all reliable and, therefore, the learned Sessions Judge committed grave error in convicting the appellant-accused on the sole testimony of Manki.

#. Before appreciating her submission we would like to narrate relevant evidence of the prosecution witnesses, which is as under :-

Lahanu PW-2 Ex.11, who lodged the FIR at 4.15 p.m. on 14.2.1994 has admittedly not witnessed the incident. He has stated in his evidence before the court that on 14.2.1994 at 7.00 a.m. Parsu Lalji, nephew of deceased Daiju came to his house and told him that Sarpanch was killed. Thereupon, he went to the house of the Sarpanch and saw that on the left ear of deceased axe blow was given and because of that he died. Thereafter, he went to Vansda Police Station and lodged the FIR at Ex.24. He also stated that when he had gone to the house of the Sarpanch his wife Manki did not talk anything to him. He does not know the cause of the incident.

In his cross-examination he stated that Parsu is also nephew of deceased Daiju. But, he was his sister's son, whereas Parsu is also nephew but he is brother's son. Parsu Lalji came to his house to inform about the incident. But he had not stated in his complaint before the police that Parsu has come to inform about the incident. Whereas, he has stated before the police that Parsu came to his house. In fact, Parsu Lalji had come to inform him about the incident. He asked Parsu Lalji, who sent him. Thereupon he told him that his mother i.e. wife of Sarpanch sent him. He had not inquired from Parsu Lalji about who was the assailant. Neither wife of the deceased Sarpanch had also not sent any message through Parsu about who killed her husband. He has categorically stated that when he had reached the place of incident at that time he had not seen wife of deceased crying and gave the name of the assailant before him

though he waited there for about 1 to 20 minutes. She had only stated that somebody assaulted the Sarpanch and, therefore, he may go and lodge the complaint. At that time, Parsu Lalji was present.

Thus, from the evidence of this witness Lahanu it is clear that neither Manki wife deceased-Daiju had sent the message through Parsu that who assailed nor she had disclosed the name of the assailant before him when he reached her house. She had only stated before him that somebody has assaulted her husband. Thereupon, he lodged complaint at Ex.24 without giving name of the assailant.

#. Manki, wife of deceased Daiju PW-3 Ex.13 stated in her evidence before the court that previous day of incident, Bhanu of her village came to her house and told her that Rupa (accused) beaten his wife Jingu, who was his sister, but he did not give the reason for beating her. Thereupon, she told Bhanu that Daiju had gone to cave to take bath. When Daiju came back to the house she told him that Bhanu had come to complain to Daiju, but Daiju told her that it was already night, therefore, he will go in the morning. Thereafter, they had gone to sleep after taking meal. She and her husband-Daiju slept in the corner of the room, whereas, her son was sleeping on the cot. Deceased had put on three sarees on him. Doors of the house were closed from the inside. Accused-Rupa came in her house and gave accused blow on the head of her husband. She started crying. Thereupon people from "Khali" came to their house. They were Lalji, Sukkar, Keshu, Sonu and Magan. By that time accused-Rupa ran away. She told them that after giving axe blow to her husband, Rupa had ran away. Thereafter, she became unconscious. Lahanu with Parsu came to his house. The incident must have happened at about early morning hours of 4.00 a.m. At that time she was sleeping, but she got up on hearing the noise of axe blow given to her husband. There was kerosene lamp in the room and in light of it she had seen Rupa with an axe wearing black short. The motive behind the incident was that accused was quarrelling with his wife and why the deceased was not bringing end to the quarrel. She was not knowing for what the accused was having quarrel with his wife. Persons who came from Khali to her house were made to stay in Khali because food grains were lying there in the said Khali, which cannot be stolen by anyone in the night.

#. In her cross-examination, she stated that she had not sent anyone to call Lahanu, but Parsu had gone to call him because of the say of the villagers. She had not

sent anyone from the persons, who came to her house from Khali to the police to lodge complaint. She had not stated to Lahanu who assaulted Daiju. She informed Parsu Budhu that that Rupa gave blow. She has no enmity with Lahanu. There is no quarrel between Parsu Budhu and Lahanu. House of Parsu Budhu was near to the house and on hearing her shouts he came to her house when Parsu had gone to the house of Lahanu she had no talk with Parsu. When Parsu came with Lahanu to her house she had no talk with him. She had not spoken anything about the crime. She had only given name of the accused as the assailant. When Lahanu and Parsu came to her house she was loudly crying and telling that Rupa was the assailant at the time of incident. Apart from crying, she had shouted that Rupa gave blow. She stated that she did not know the Sarpanch of the village Moda Amba was with Lahanu. She became unconscious when the crime took place and people came from Khali. She was not knowing that in what position Daiju was sleeping at the time when he was assaulted with axe. When Daiju was sleeping he rapped himself with three sarees from his toes to head. He covered the entire body with sarees even at the time when blow with an axe was given to him. She had denied that Rupa had not assailed her husband with an axe and someone else assaulted him. She had also denied that her husband had enmity with another Sarpanch, who lost the election. She had also denied suggestion that her husband had many enemies. She had denied that she had not seen Rupa giving blow with an axe and simply seen Rupa going with an axe. However, thereafter, she stated that she had not actually seen Rupa giving axe blow because at that time she was sleeping. She was sleeping with her husband, therefore, she had also received the blood stains. Her blouse had blood stains, but she had not stated before the police she had washed her blouse. She had denied the suggestion that when her husband had gone to take bath in cave at that time he fell down and sustained injuries. This is the evidence in nutshell of this witness Manki.

#. From her evidence, it is clear that she was sleeping with her husband in her house on the fateful night. The incident in question took place at 4.00 a.m. The doors of the house of the accused were closed and if that is so, then it is difficult to believe that Rupa would enter the house easily with an axe. Initially, she claimed to have actually seen the accused-Rupa giving blow with axe on the head of her husband, but then she had to admit that she had not seen Rupa giving blow with an axe because she was sleeping. It is also difficult to believe that she could have identified Rupa in her house because admittedly there was no electricity in their

house. She claimed to have identified the accused while going away with the axe in the light of mere kerosene lamp in small kacha house. It would be very difficult for a person, who is in sound sleep, wakes up all of a sudden and immediately identify the person and that too in such a dark night. It is an admitted fact that when the Deputy Sarpanch came to her house, she had not named the accused as assailant and because of that only Lahanu had lodged the FIR without naming the accused. Natural conduct of the person immediately after the incident was to raise shouts when she had seen the accused going away with an axe, but except crying she did nothing. We are not prepared to believe her evidence that accused came in the house at 4.00 a.m. in the morning and straightaway gave blow on the head of the deceased, who was sleeping on the ground along with his wife. The deceased had covered his entire body with as many as three sarees right from his toes to head in that case it would be impossible for the accused to exactly identify that the deceased was sleeping there only and none else in the darkness. Under the circumstances, we are not prepared to place any reliance on the evidence of this witness Manki.

##. From the two other witnesses Lalji Keshu PW-4 Ex.17 and Sukkarbhai Devlubhai PW-5 Ex.18, they are examined for the purpose of proving motive. Admittedly, they have not witnessed the incident because they were not present. Lalji Keshu stated in his evidence that on the previous day at about 6.00 p.m. in the evening when he was taking bath with deceased-Daiju, at that time Rupa came and told Sarpanch-Daiju why he was not taking his side when he had quarrel with his wife. On that next day early in the morning at about 4.00 a.m. wife of Daiju was crying and on hearing the same they had gone to the house of Daiju and saw Daiju lying dead having received injury on his head. At that time, wife of Daiju told him that Rupa ran away after killing. They made search of Rupa but they could not find him. They stayed there. Parsu called Deputy Sarpanch Lahanu, who had gone to lodge complaint. He does not know the reason behind the murder.

In his cross-examination he stated that Daiju was Sarpanch since last 4 years. He made many compromises between the parties. The accused-deceased-Daiju had no quarrel. When they had gone to the house of Manki she was all alone in her house there was no electricity in the house of Sarpanch. Thus, nothing turns out from his evidence, except the fact of Manki telling him that accused killed her husband. We are not prepared to believe his evidence in view of the evidence of

complainant, Deputy Sarpanch-Lahanu before whom Manki, wife of deceased had never stated that accused was the assailant.

##. Another witness Sukkarbhai Devlu stated that at the time of incident he was at his house. Magan Bablu came to call him thereupon he and Ex-Police Patel, Bhanju had gone to the house of deceased-Daiju and found Daiju dead. Manki told them that accused-Rupa killed him with an axe and ran away. They waited for the arrival of police. Police came and done necessary procedure. On the next day they inquired about the accused-Rupa at his home. But he was not to be found. But on the third day Rupa found at his home. Bhanju was also with him. When they had gone to the house, Rupa started running here and there because of that he fell down and received injuries on his head. He asked Rupa as to why he was running here and there to which Rupa replied that deceased was coming to his house and having doubt he killed him with axe. Thereafter, Rupa was taken to the police.

In his cross-examination he stated that when they came to know about murder of Daiju then they reached at about 8.00 a.m. to the house of Daiju. At that time police was not there. Police came at about 3.00 p.m. to the house of Daiju at that time they were there. But police did not interrogated him. On the next day of the incident police recorded his statement in which he had not stated that he and Bhanju had gone to the house of Rupa. At that time Rupa was at his house. Before they apprehended Rupa they came to know from the village people that Rupa had committed murder of Daiju. They apprehended Rupa and produced him before the police and in presence of police Rupa confessed that he killed Daiju. He stated that in his presence Rupa and Daiju had not quarrelled. He denied the suggestion that Rupa had never confessed his guilt before him and talked about the incident.

From the above evidence of this witness Sukkarbhai it is clear that he has gone a step ahead of all the witnesses, including the wife of deceased-Daiju. He tried to prove motive behind murder, which has come for the first time in his evidence before the court that Daiju was coming to the house of the accused, therefore, the accused had doubt in his mind. He claimed that he had gone to the house of Rupa along with Bhanju. But said Bhanju was not examined by the prosecution. We are not prepared to believe his evidence on the point that accused Rupa confessed his guilt before him that he killed Daiju as there was no reason for him to make any

statement before this witness. Evidence of this witness Sukkarbhai does not carry the prosecution further.

##. This brings to the evidence of I.O., Shri Rambhai Jhala, who has tried to prove discovery of weapon. We are not at all impressed by the same. It was taken out from the open place below the tree by the accused. From his cross-examination, it is clear that next day discovery was never made at the instance of the accused.

##. This brings us to the judgment delivered by the learned Judge convicting the appellant-accused for the offence for which he was charged. It appears that without properly appreciating the evidence of this witness Manki, the learned Judge has relied upon her evidence. The learned Judge ought to have kept in mind the important aspect of the case viz. that she was closely related to the deceased as she was none else, but the wife of the deceased and in absence of any corroboration to her evidence, it would not be safe to convict the appellant-accused when her evidence is found shaky and not reliable. At the cost of repetition, we may state that there was no light in the room to identify the accused because the incident took place in the early morning hours of 4.00 a.m. where there was no electricity. Her conduct at the time of incident and immediately after the incident was also not natural. She could have immediately gone to the police and lodge the complaint against the same but she did not do it. When the Deputy Sarpanch came to the house she did not disclosed the name of the accused as assailant. Therefore, when Lahanu, Deputy Sarpanch came to his house she did not disclose name of the accused as assailant. Therefore, when Lahanu went to lodge complaint after 12 hours of the incident then in the said FIR name of the assailant was not disclosed. All these aspects of the case have been totally overlooked by the learned Judge while convicting the accused. Evidence of rest of the witnesses was not at all material for convicting the appellant-accused. Ld. Judge should have kept in mind the fact that being Sarpanch, deceased-Daiju might have many enemies in the village. It is difficult to believe the story of Manki that the accused had entered the house of the deceased when the doors were closed from inside.

##. In view of the above discussion, this appeal is allowed and the impugned judgment and order of conviction and sentence dated 22.5.1997 passed by the learned Sessions Judge, Navsari in Sessions Case No.68/94 convicting the appellant-accused, Rupabhai Kakdiyabhai Varli for the offence u/S.302 IPC and sentenced him to

suffer life imprisonment and to pay fine of Rs.5,000/= in default to further undergo 2 months SI is hereby quashed and set aside and the appellant-accused is acquitted for the charge of murder u/S.302 IPC levelled against him. He is presently on bail, therefore, his bail bonds stands cancelled. Fine, if paid, be refunded to the appellant-accused.

(B.J.Shethna, J.)

(J.R.Vora, J.)

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